No. 201.

Reply Brief of Haines for Appts.

Supreme Court of the United States,

OCTOBER TERM, 1899.

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H. C. OSBORNE ET AL.,
APPELLANTS,
vs.
SAN DIEGO LAND AND TOWN COMPANY OF MAINE,
APPELLEE.

No. 201.

REPLY BRIEF FOR APPELLANTS.

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Counsel for Appellants.

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Counsel for appellants, in their brief (p. 8), in professed accordance with Sec. 552 of the Civil Code, define each appellant's interest in the water system of the corporation, and also the duty of the corporation collateral to such interest, as follows:

"It is the simple right to the perpetual flow of the "water through the company's system; coupled with the "obligation, on the part of the company, to keep its system "in such condition and repair as may be necessary to "supply the water."

This seems to us a clear recognition of the *jus in rem* and *jus in personam*, respectively, the distinction between

which is shown in the authorities cited in our opening brief (pp. 118–121).

Also the Court below, having in view the rights of the appellants, speaks (76 Fed., p. 334) of "the consumer "whose rights have once vested;" and of his "right to "the continued use of water which he has acquired as a "perpetual easement to his land."

Thus the actual ownership by the appellants of their respective vested freehold servitudes on the water system annexed as perpetual easements to their lands, is conceded by the Court, and by counsel for appellee. And we submit that there is no occasion, as seems to be done in the brief for appellee (p. 6), to confound the legal title of the system, which is in the corporation, with the appellants' claim that their perpetual easements are freehold servitudes upon such system. Counsel, however, manifest a fine scorn for the word "easement" and the word "servitude" (Brief, pp. 6–8); and even seem to think that counsel for appellants are attempting to overthrow the State Constitution and statutes by "appalling" refinements and subtleties of argument under those heads (Brief, p. 6). We find, however, no occasion to apologize for seeking to avail ourselves both of the working terminology and the principles settled by the juridical experience of centuries under these titles of the law, in the humble attempt to work out a consistent and rational legal conception of the relations between this and like water companies and the irrigators under their systems. For there is in this state a crying need for such a conception. In this very case the Court below and counsel for appellee differed fundamentally as to how the admitted ownership of the defendants in their perpetual irrigation easements came about; yet a correct idea of this is the key to solve the whole problem.

The Court holds that it could not have arisen contractually, but fails to show how it could have arisen otherwise. Counsel for appellee, however, insist that a water company may legally contract to sell and grant a water right, and this is natural and proper; for it would be disastrous to the corporation to deprive it of the right to sell land and water as one estate, according to the primary purpose of its original scheme; especially since it owns and holds for sale over one-third of the planted and improved lands irrigated under the system (Trans. p. 24), as well as large tracts of improved land. But strangely enough, while saying of the defendants that "*Most of them bought their lands from the company with water*, and thus acquired the water right by the application of the water to their lands" (Brief, p. 4), and that this "One class bought land from the company with water attached" (Brief, p. 7), counsel seem in the same breath to deny that such purchasers either contracted for, or bought, or paid for a water right. We must ask, then, for what did these people pay the company from $250 to $500 an acre? For the raw, arid land, worthless without the water? So counsel seem to imply, as, with deference, we think inconsistently, and in disregard of the allegations of the answer, which stand admitted. Counsel seem to say that no one bought a water right under this system until after December, 1892, apparently, because it was only after that date that written forms of contract making specific mention of the water right were adopted by the corporation, either in sales of its own lands, or in annexing perpetual easements of the use of water to other lands (Trans. pp. 21–23). To be consistent, counsel ought also to deny that a water right was paid for in sales of its own lands under the form of contract found at page 21 of the transcript, for there, too, the land and water were bought at one price *in solido*.

But neither court nor counsel can account for these private, perpetual easements, which the original bill, the opinion of the Court, and the arguments of counsel admit to have vested in the defendants, if they reject the principle of grants from the corporation, express or implied. There is no other way of accounting for them under the present constitution of society, or short of thorough paced Socialism. Counsel for the appellee, on the face of the original bill, is not in position to deny that every one of these water rights was created by grant of the corporation to the respective defendants. Whether such grants were made on the basis of payment down of the full price, set by it, of the easement proper, subject to the payment of $3.50 per acre, as by far the most were, or whether they were the voluntary grants implied from conduct and made by the corporation subject to the annual rate of $3.50 per acre, as some were; whether the price of the easement was lumped in with the price of the land sold by the company, or separately paid when annexed to other land, or whether the $3.50 annual rate per acre was fixed by the corporation in the belief that it would "return its operating expenses and pay it some interest on its investment," as it did in the original bill (Trans. p. 10), or only its operating expenses, does not change the fact that the interests of each of the defendants became a vested property right—a perpetual easement *owned* by him as stated in the bill, and as reaffirmed in the brief for appellee (p. 9).

An offer made by the corporation to a land-owner to furnish him with a perpetual supply of water delivered on his land, if he will pay for the use thereof a rate of $3.50 per acre per annum, accepted by him, and acted upon by both parties, becomes in the eye of the law just as much a contract relation, and the resulting easement is as much a grant based on contract as is the easement granted for

a price paid for the water right over and above the annual rate.

Counsel manifest a late disposition to discriminate between the owners of the easements (Brief, p. 4) in respect of the question of the power of the corporation to increase water rates *in invitum*. But neither the bill, nor the answer, admits of such discrimination; nor does the rule of classification of lands adopted by the corporation itself (Trans. pp. 47, 48); nor does Sec. 552 of the Civil Code; in fact, that section expressly puts irrigators of land not purchased of the corporation, who have been furnished water by it with which to irrigate their land, upon the same footing as those who have purchased their land from the corporation, thus making the *latter class the standard*.

Indeed, we submit that the main question in this case,—to wit: whether the corporation has the power, *ex mero motu*, to double the actual irrigation rate as established by itself at the time these easements vested, and as collected by it to the date of this suit,—might with entire propriety be judged by taking as a test case the water rights under the form of contract for sale of land and water set forth at page 21 of the record.

Power to Contract about Water Rights, Necessarily Implies the Power to Contract about Water Rates.

Thus counsel roundly assert in this case, as they asserted for the owner of the same system in the case of *San Diego Land & Town Company* v. *National City*, 174 U. S. 739, 743-4, that these water rights are lawful subjects of contracts of sale and purchase. Yet at the same time they set for themselves the absolutely hopeless task of proving that there can be no lawful contract respecting

annual rates to be paid the corporation in respect of these same easements, whether merely for maintenance, or for both maintenance and net revenue. Counsel go further, and assert not only that the purchase of the freehold easement at a gross price *paid*, cannot lawfully be accompanied by a contract annual rate to be paid, but also, as a matter of law, "that the acquisition of that water right *has no effect whatever* on the liability of the consumer to pay the annual rates, *or the amount to be paid*" (Brief, p. 7); and again (p. 3) that "whether a contract for a water right was valid or not, *has nothing to do* with the liability of the consumer to pay annual rates, *or the amount to be paid*."

Counsel have yet to point out a way to reconcile the two positions—that a contract may be made to grant a perpetual easement, but not respecting the maintenance of the easement; to create the water right, but not respect-the water rate; for the creation of the principal thing, but not respecting an incident made collateral to it.

They have also yet to point out on what principle the corporation assumes that it may grant an easement in fee, and still retain the repugnant power to subject it to any new rate it sees fit, to produce net revenue. Such a grant "would be in effect to give and not to give, in the "same breath," in contravention of all recognized principles relating to grants of other interests in real property. *Potter* v. *Couch*, 141 U. S. 296, 317.

It is impossible to entertain these inconsistent and self-contradictory views, until the state of mind is arrived at, which can seriously say with the brief for the appellee, of the admitted water right of each defendant, that "it makes "no kind of difference in this case *what* it is."

And that "The question as to the exact nature of the "rights of the appellants and the corresponding duties of

" the company are (is) *wholly immaterial* and confuse(s),
" rather than aid(s), in arriving at an intelligent and just
" conclusion upon the real and only question presented
" by the issues."

And this question counsel state to be, whether the corporation has the right and power to double its annual rates as against vested easements.

The Court, however, perceived, and in this respect the appellee seems to differ, that to admit that the perpetual easements of the defendants rest on the basis of contract, must necessarily involve the admission that the rate contemporaneously established, is also contractual. The Court saw, that if a water right can be bought, and has been paid for, this must necessarily affect the annual water rate, in any case where that can be assumed to be left open to be fixed by public authority. For it requires neither "appalling" refinement nor subtlety, to see that it would be an outrage for the "State," which in this case is made to mean simply the corporation, to compel the irrigator, without his consent, to pay interest as net revenue on the value of the easement, the price of which it has already collected in lump, and covered into its treasury.

So the Court avoided this by simply declaring that the defendants who bought water rights, whether lumped in with the price of the land "with water attached," or separately from the price of land, paid their money for naught. As far as the practical result under this decree, to the defendants, is concerned, they experience no difference, in the *outcome* to them, between the theories of Court and counsel. They see only this difference, that the theory of the Court makes them melancholy examples, pilloried as warnings to such unthinking persons as might else continue to harbor the delusion that one who buys a water right owns what he pays for; while the theory of

counsel would still spread the net and the bird-lime for new victims.

The Court, in holding that no contract can be made in California between a water company and an irrigator, respecting either water rights or water rates, is wholly and consistently in error; while counsel is correct as to the former proposition, but both inconsistent and erroneous in the latter.

THE RATE OF $3.50 PER ACRE WAS FIXED BY CONTRACT BETWEEN THE CORPORATION AND EACH OF THE APPELLANTS.

Counsel are also in disagreement with the Court below as to whether the parties in fact agreed upon the $3.50 annual acreage rate. The main part of the argumentative portion of the opinion proceeds upon the assumption that the record does show such agreements (76 Fed. R. 334–339); while counsel contend it does not.

The matter in the record bearing upon this fact is found in the bill at the record folios 12–13, and in the answer at folios 27–35, and 39–41.

It is, in brief, that in all cases where the corporation sold land, it sold it with water, at prices enhanced by reason of it, and upon the express representation that the annual rate would be $3.50 per acre; that where it annexed the irrigation easement to other lands, it did so voluntarily, the terms being fixed by itself, and at the same annual rate established by itself; and that all the defendants were induced to purchase, improve, and settle upon their respective parcels of land in reliance upon such represented and established rate; and that this rate became from the beginning of the service in 1887, down to the commencement of this suit, the "actual rate estab-

"lished and collected" by the corporation (Act 1885, Sec. 5).

If there were nothing more in this case than the adoption and public promulgation by the Water Company of a schedule of water rates, including an irrigation rate of $3.50 per acre per annum, at which it invited people to acquire the perpetual easement of the flow and use of water to their lands, as defined in Sec. 552 of the Civil Code, the acceptance of this offer on the part of landowners by the application of the water to their land, and by the payment of that rate for years, would be amply sufficient to show a contract for the easement at that rate, making the rate as perpetual as the easement itself, and its constant reciprocal. *Boyd* v. *Brincken*, 55 Cal. 427; *Southern Pacific Railroad Company* v. *Terry*, 70 Cal. 484; *Avila* v. *Pereira*, 120 Cal. 589, 595. These were cases in which a railway company offered by circular issued and distributed, to any one who should settle upon and improve land of the company, to sell it to such person as soon as the company should fix a price upon the same, at the price so fixed. Persons accepted that offer by settling upon and improving the land, and notified the company of their acceptance by filing in its office applications to purchase, as soon as the price should be fixed. It was held that this made an executory contract which would be specifically enforced against the company as soon as the price was fixed. Here in all cases the rate was unconditionally fixed by the company in the first instance; and the use of the water and payment of the rates make the acceptance of the company's offer conclusive.

What is thus true of those who did not buy land of the corporation, is at least as true of those who did buy at the large prices and under the express representations that the established rate was $3.50 per acre per annum,

put forth as an inducement to purchase. It is also at least as true of those who, under the same representation as to the established rate, paid earlier $50 per acre and later $100 per acre for their water rights.

The court in *Boyd* v. *Brincken*, 55 Cal., *supra*, at p. 429, said:

"We think that the contract in this case belongs to that "group which is said to be 'created by representations "'made by one party, and acts done by the other party, "'upon the faith of such representations.' (Pomeroy on "Contracts, § 69.)

"'Where an absolute unconditional representation of "'something to be done in the future is made by one "'person, in order to accomplish a particular purpose, "'and the person to whom it is made, relying upon it, "'does the act by which the intended result is obtained, "'a contract is thereby concluded between the parties.' "(*Id.*)."

Counsel, in respect of the representations made to purchasers of the company's land, seem to abandon the position that this was not in its nature contractual; and fall back upon the argument of the opinion, that the law forbids the contract (Brief, p. 21).

In respect to the special contracts shown in the answer (pp. 21, 22, 23 of the record), counsel claim that they contain what amounts to *carte blanche* to the corporation to alter and increase the established rate. But it is conceded (Brief, p. 16) that these clauses in the contracts added nothing to the rights already existing in the company by law; and we think this, so far forth, is true; we think with counsel that it is also true, that the clauses respecting rates in the Ballou and Ex-Mission cases, were intended to make the rates of the contracting parties uniform with all other consumers.

What, then, was at the date of the special contracts set forth on pp. 21–23 of the record, the rate referred to in them as the "*regular annual rate allowed by law*" and the annual water rate "*fixed by the first party as allowed by law*," for irrigation? Unquestionably $3.50 per acre. It is the asserted power to change and double this rate which is questioned and denied here. That power, by the very terms of the contracts, must *be allowed by law*, or it cannot exist. It must be allowed by the universal principles of the law of contracts; it must be allowed by the statutes (which we think harmonize with the power to contract, and if not, so much the worse for the statute), or the power does not exist.

But neither Court nor counsel have been able to point out anything in the statutes which permits this jumping of rates; and as for general principles of law, they deny them any application.

We agree with counsel (Brief, p. 13) that the provision in the latter part of Sec. 5 of the Act of 1885 is just as much a regulation of the rates, as the provision that rates may be fixed by the board of supervisors. We also agree with Messrs. Garber and Short, the *Amici Curiæ*, in their statement (Brief, p. 43) as follows:

"All rates established in pursuance of the Act of 1885, "whether by the supervisors or by the individual or cor- "poration supplying the water, are merely *maximum* "rates."

Our argument under that head is fully presented in the opening brief, pp. 196–210. This, we regret to say, has not received the criticism of counsel for appellee, except in respect of a single remark, found at bottom of p. 209 of *our* brief. (See brief for *appellee*, p. 28.)

The attention of counsel for appellee was there distinctly

challenged to the position that the "*actual rate established* "*and collected*" by the corporation, which in this case "*shall be deemed and accepted as the legally established* "*rate thereof*," is itself a *maximum*; and *not* a thing to be changed at the pleasure of the corporation, *by an increase forced* upon the irrigator.

The attention of counsel was also explicitly challenged to the position that Sec. 8 of the statutes makes it absolutely certain, that this is the true construction of the provision of Sec. 5, if upon its face it admitted, in reason, of any other, which it does not; for the mandate of Sec. 8 is that the corporation already furnishing water, *shall so* furnish at rates *not exceeding* the rates as fixed and established as provided in the Act, *i. e.*, at the *actual* rate established and *collected* by the corporation, which is declared the legally established rate; and *that* is, under the facts here, the $3.50 acreage rate, and none other.

If, as counsel for appellee truly say, the provision of Sec. 5 is just as much a regulation of the rates as the provision that rates may be fixed by the Supervisors, it is also true that Sec. 8 shows that the actual rate by it defined, is just as much a maximum in the one case as the rate fixed by the Board is in the other. That section declares the equiparency.

Yet, we must here note the significant fact, that neither the Court nor counsel make in argument a single allusion to these *maximum* features of the statute; nor does either refer once to the important section 8.

We submit that if the learned Court below had considered and weighed these leading provisions of the statute, it would have found it impossible to reach the decision it did; and that the fact that able counsel, when invited, make no allusion to them, shows that they furnish unanswerable objections to so much of the argument for the

appellee as proffers succor to the decision, after having fatally wounded it, by conceding that it is wrong in holding that in California there can be no uniting of title to land and the use of water, through the sale and purchase of water rights.

It seems proper to point out here that the *Amici Curiæ*, after reiterating with entire correctness (Brief, p. 45), that "At most, the schedule rate is a mere maximum, just as "is a rate fixed by the supervisors," fall into an inadvertency in their succeeding statement, viz:

"The only difference being that the supplier can change "the schedule at will, which cannot be done with the "other rate."

For how a schedule maximum, which the compensation is forbidden to exceed, either as against vested easements (Sec. 5), or as a condition to granting new easements (Sec. 10), can be avoided by simply changing the schedule, is not explicable. It would be tantamount to saying that the corporation, though *forbidden* to exceed the maximum, *can* exceed the maximum, by the device of *increasing* the maximum, which, as the human mind is constituted, seems to be a contradiction in terms.

A schedule rate for railway transportation from San Diego via Chicago to New York, when accepted by the shipper or the passenger, becomes a *through* contract; therefore the railway company, on the arrival at Chicago, is not permitted to increase the schedule rate against the other contracting party for the remainder of the journey.

Sec. 522 of the Civil Code is a distinct notice to the parties that the subject of their contract is a perpetual easement; and that the rate partakes of the same quality; therefore the corporation is not at liberty to change, *ex parte*, at its pleasure, the terms of this permanent engagement, for it also is very decidedly a through contract.

II.

Counsel say (p. 21 of their brief) that it is inconceivable that it should have been intended by the law-makers that there should be no relief for a company that had once fixed a rate, that must result, if not changed, in the absolute financial ruin of the company; for this, they say, would result in the ultimate defeat of the purpose sought to be accomplished, and deprive the consumers of the service to which they had become entitled. To this we reply that there may arise cases where the rate established by the corporation is so low that it will not suffice to pay the reasonable annual costs of repairs, management, and operation. But that is not *this* case. Counsel refer to the allegation in the bill that at the rate of $3.50 per acre per annum the company cannot pay its operating expenses, and is losing money. But the answer denies this. (Record, folio 42.) And its denials are to be taken as true. And it avers that the books of the corporation showed, as early as January 1, 1894, a large net surplus from the rates to the credit of the water system (record, folio 38); and avers that when the bill was filed only one-half the capacity of the system was in use, and shows that the unemployed part had to be maintained for the benefit of the unimproved lands of the company, which contributed nothing to the alleged amount of the annual rental (record, folios 42, 38). Also, that under the circumstances, the income for the year ending January 1, 1896, just before the filing of the bill, was $25,715, and the utmost stretch of expenses were not to exceed $12,034.99.

If there is any decision anywhere which justifies the including the interest on the bonded debt of the corpora-

tion in this case, *as part of the operating expenses*, as claimed by counsel, we do not see it cited. This Court surely did not so hold in the case of *San Diego Land and Town Company* v. *National City*, 174 U. S. 739, 757. In the State of California just the contrary is held.

In *Redlands, etc., Water Co.* v. *San Diego*, 118 Cal. 556, it was held :

"The interest upon the indebtedness of the Water Com-
" pany is not a proper item of expenditure to be provided
" for in fixing the annual rates to be charged or collected
" for furnishing water to the inhabitants of the city, and
" that a water company is not entitled to have the rates
" so fixed as to enable it to set apart a certain amount
" each year as a sinking fund for the depreciation of its
" plant. The provision of the judgment herein, directing
" that the rates be fixed so as to assure an income sufficient
" to pay these items, is inconsistent with the principles
" declared in the San Diego case."

Not even on the facts stated in the bill can this contention of counsel, that the rates do not pay operating expenses, be supported, as we have shown in the opening brief (pp. 243–246). And it certainly cannot be supported under the tenor of the answer. If this company became embarrassed, it must be remembered that the answer shows that it is under the expense of attempting to carry on over 1,500 acres of citrus orchards; also that it owns and operates a railroad, and has been carrying on other branches of business specified in its articles of incorporation. These things, and not the water system, caused its deficits.

But counsel declare it a waste of time to discuss the *reason* or *necessity* for making the change (Brief, pp. 18–19). We quite agree that inasmuch as the Court below "wasted" no time on what counsel consider so "immaterial" a mat-

ter as any reason for change of the rates ; and as counsel truly say (Brief, p. 30), gave no decree thereon ; and since the Court struck out as impertinent nearly every allegation in the answer bearing thereon, there is no conclusion of the Court upon any reason for increase of rate to be reviewed here.

The only question to be considered is whether the corporation have the arbitrary power *without reason* to double the rate, and shut off the water from the whole community to enforce it. The theory of counsel is that to oppose such power as is asserted for the corporation in the bill, " *the one and only thing that could have been a sufficient* " *answer* " was " that the appellants, or others competent " to do so, had applied to the Board of Supervisors and " had rates fixed." (Brief, p. 26.)

The frankness of counsel simplifies the discussion, and causes surprise that so much was alleged in the bill. We make no further comment beyond such as is contained in the opening brief on this phase of State regulation, acting through the corporation as its vicegerent, and so the *politi al superior* of the irrigators. But, returning to consideration of the meaning and policy of the statute of 1885, let there be granted, for the sake of the argument, the abstract possibility that a water company, for any imaginable reason—ignorance, mistake or over-anxiety to attract settlers under its system, to use its water, either as purchasers of its land or otherwise, or what not—might fix an irrigation rate too low to maintain the system after it is fully in use.

Does the statute undertake to insure the corporation against any such contingencies by making it immune against its contracts, and by bestowing upon it the arbitrary power to change and increase its rates and to dictate to the Courts to issue their injunctions and decrees to en-

force the demanded increase, without so much as allowing the inquiry whether there was any reason for the change? Or, does the statute consider that a conditional right given to not less than 25 inhabitants and tax-payers to apply to a Board of Supervisors to make future rates, is a panacea for all the possible wrongs and exactions which a water company may perpetrate meanwhile under this irresponsible grant of power. We most respectfully submit that this is not the law as written.

III.

The Question of Public Policy.

The question of public policy affecting the controversy here, with which this statute of 1885 deals, is whether, because of the chance that water companies may make improvident contracts about perpetual rates for perpetual easements, all water companies should be exempted from the contract status and vested with the arbitrary power to jump up rates, as here claimed. It is, at the bottom, a question between a social condition based on freedom and one based on paternalism. Even freedom has its inconveniences; but we think that the statute recognizes the chance of the making of improvident contracts as the lesser of the two evils, and so contemplates that the corporation may obligate itself by a contract rate, notwithstanding this chance; that such contracts may be made through the acceptance of water for irrigation at a schedule rate adopted by the corporation; and that in such case the law makes this a legal established contract rate, which the corporation cannot exceed against the will of existing irrigators; and that the statute even excludes a corporation from the right to invoke the power of the

Board of Supervisors, so far as it extends to change this schedule rate.

If, in any case, it should turn out that this rate is not sufficient to maintain the system, still, as to all who have become irrigators under it, and whose rights have vested, it remains a contract rate which the corporation cannot disturb without their consent.

And since these owners of servitudes in a water system have a most direct and proprietary interest in having the system kept in repair, the policy of the law is to leave it to their instinct of self-preservation to make such new terms with the corporation as will, in their judgment, effect this object, if the old terms fail of the purpose.

In other words, the policy of the law is to leave the balance of power to effect any increase of rates with the irrigators, and not with the corporation.

It seems to us that this is the very essential principle of the curb and check which the law has provided against the abuse of the natural monopoly which corporations have in their control of the water supplies for irrigation in an arid region—for it is, indeed, and in the nature of things *the power of the keys*. Permanent contracts for rates have been common under the older irrigation canals, in the State of California; as, for example, in the cases cited in *San Diego Land and Town Company* v. *National City* (174 U. S. 739, 758). So, also, in Europe. For example, in the case of the Bourne Canal in France, it is said in Hall's Irrigation Development, Part 1, pp. 88–89, that the conditions of the concession from the Government in respect of benefits to the grantee company included the following:

"1. The authority to collect water rents for the term of "99 years, as follows:

"*For Irrigation:* From all who subscribe before
" water is put in the main canal, for a fixed amount
" of water annually, at the rate of 50 francs per liter
" ($269 per cubic foot, at most $3.27 per acre per
" season) of discharge per second during irrigation.
"From all who subscribe after the water is put in
" the main canal, at the rate of 60 francs per liter ($323
" per cubic foot) (at most $3.92 per acre per season)
" of flow, etc."

In this connection we take the opportunity to call the attention of the Court to a recent paper by a Mr. L. M. Holt, entitled "Irrigation Development," which contains, as we think, a reliable and interesting historical sketch of irrigation development in California, and made by a very competent and experienced student of the question. Copies of this we shall ask the privilege of leaving with the clerk for the use of the Court.

But, without further enlarging on the public policy evinced by the statute, and without going into the question of the functions and limitations of the Boards of Supervisors under the Act of 1885, we submit that the *lex scripta*, applicable to the facts here, is plain and unmistakable; and that considered together, the Act of 1876 (Sec. 552 of the Civil Code), the sections 5 and 8 of the Act of 1885, and the Act of 1897 declare with recurring and progressive emphasis that a water company shall not have the power to depart from the fundamental representations which it made, by word and by deed, as to the cost of water supply for irrigation, under which it sold its lands, and attracted a population from all the civilized parts of the earth to settle in what, without water, is and has been a desert since the waters of the sea gathered themselves together and uncovered the land.

Questions of Principle.

Exceptions to Answer for So-called Impertinency and Insufficiency.

Counsel for appellee (brief, p. 24) takes the position that if the Court below was right in holding that irrigation rates cannot be fixed by private contract or by estoppel, through representations or by prescription, and that irrigators in such case as this have no judicial remedy against any change of rates by the corporation, and the forfeiture of the water supply to enforce them, then that it necessarily follows, that all the allegations in the answer relating to these defenses were both impertinent and insufficient.

We think, in point of practice, that the question of the validity of these defenses is not properly and regularly raised by proper exceptions, either for impertinency or insufficiency. This question, as respects exceptions for impertinency, was sufficiently discussed in the opening brief (pp. 253–5).

And the use of the exception for insufficiency to try the validity of such defenses, is, of course, a misconception of the office of such an exception. Indeed, the argument of counsel in this respect aids our contention that the real intent and proper effect of the third, fifth, and sixth paragraphs of the supposed exceptions amount to the setting down and submission of the cause on bill and answer, and that they are misnamed exceptions for insufficiency.

The other arguments of the brief of appellee have been anticipated and discussed in our opening brief.

And, in conclusion, we respectfully submit that the case is here for final disposition as submitted in our opening brief.

A. HAINES,
Of Counsel for Appellants.